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No. 85-1541

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

FRANK J. BATTAGLIA, *et al.*,
Petitioners,

v.

ROBERT M. BERGER, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

May a white police officer who, in his off-duty hours, performs in public, in blackface makeup, an imitation of the late singer Al Jolson, consistently with the First and Fourteenth Amendments, be disciplined by the Police Department for conduct "that tends to reflect discredit upon himself or upon the Department," on the ground that certain black citizens objected to the performance, and the Department feared that the officer's activity would impair its community relations efforts with black citizens.

PARTIES

The parties to the proceedings in the United States Court of Appeals for the Fourth Circuit included:

FRANK J. BATTAGLIA, Individually and as Police Commissioner, City of Baltimore,

and

Baltimore Police Department

Appellees Below
Petitioners Here

v.

ROBERT M. BERGER

and

RAY FRANKLIN BARHIGHT, JR.

Appellants Below
Respondents Here.

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Respondents, Robert M. Berger and Ray Franklin Barhright, Jr., respectfully pray that the Petition for Writ of Certiorari, as sought by the Baltimore Police Department, be denied.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 779 F.2d 992 (4th Cir. 1985), reprinted in the Petition for a Writ of Certiorari as Appendix A. The opinion of the United States District Court for the District of Maryland is unreported (No. B-82-880,

USDC, DMD., March 21, 1984), reprinted in the Petition for a Writ of Certiorari as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 20, 1985. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States, I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV:

> § 1. Citizens of the United States
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code, Title 42, § 1983.

Civil action for deprivation of rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Ter-

ritory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this action, any Act of Congress applicable exclusively to the District of Columbia shall be construed to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The Respondents accept Petitioners' statement of the case with the following exceptions more accurately set out by the Court of Appeals:

> In none of his performances did Berger identify himself as a police officer; offer any comment on Department policies or operations; make any reference to any other member of the Department; nor claim to be speaking for or in any way representing the Department. Although various media, in commenting on or describing his performance, referred to him as "the singing cop," that designation was, so far as the record reveals, theirs, not Berger's.
>
> In his performance Berger's only purpose was to provide entertainment for willing listeners. He urged no conduct, incited no activity, made no derogatory or inflammatory remarks, advocated no lawlessness and sought no confrontation.
>
> From at least 1979 Berger's superiors within the Police Department were aware of his musical activities, including the Al Jolson impersonation. On several occasions Deputy Commissioner William F. Rochford had introduced him to visitors as "the Department's Al Jolson." A member of the command staff (defined as officers of the rank of captain and

above)—one Colonel Avara—made a practice of asking him to sing "Mammy" when he encountered him on the street, in full uniform. Numerous members of the command staff, including the deputy commissioner, had seen him perform in clubs and taverns. Prior to 1982, no member of the Department had complained to him about the content of his act or suggested that he not perform it in blackface.

Although he never heard anyone directly threaten anyone else, Sgt. Lawson feared possible violence if these rumors materialized into fact. He therefore requested additional police assistance.

Berger v. *Battaglia*, 779 F.2d 992, 993-95, Petition for Writ of Certiorari, hereafter Petition, 2A-6A.

REASONS FOR DENYING THE WRIT

1. THE ISSUE OF WHETHER A POLICE DEPARTMENT MAY CONDITION THE CONTINUED EMPLOYMENT OF ONE OF ITS OFFICERS UPON HIS CESSATION OF OFF-DUTY PUBLIC PERFORMANCES IN BLACKFACE DOES NOT POSE UNSETTLED QUESTIONS OF FEDERAL LAW.

When a public employer seeks to regulate or restrict its employee's speech, this Court has held that a balancing of competing interests must take place. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The interests to be reconciled are those of the public employee, "as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568.

Three years ago this Court applied the *Pickering* test to the discharge of a former assistant district attorney for her speech regarding an interoffice dispute. *Connick* v. *Myers*, 461 U.S. 138 (1983). In that case the employee was found not to have met the threshold requirement that the speech deal with "matter of public concern." *Id.* at 146-47.

In holding that black police officers could not be dismissed for picketing their department and removing the United States flag from their uniforms in protest of the department's racially discriminatory practices, the Court of Appeals for the Eleventh Circuit outlined the procedure to be followed when a public employee challenges a personnel action on grounds of freedom of speech. *Leonard* v. *City of Columbus*, 705 F.2d 1299 (11th Cir. 1983). The plaintiff has the initial burden of proving that his speech or conduct was a substantial motivating factor in the personnel decision and that the speech or conduct was constitutionally protected. *Id.* at 1303, following the rule established in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977). This burden is met by the plaintiff's establishing that his speech is protected under the *Pickering* balancing test, the threshold of which is that the speech deal with a matter of public concern. *Connick*, 461 U.S. at 146. Once the plaintiff has met this burden, the burden of proof shifts to the public employer to show that it would have reached the same decision in the absence of the protected speech. *Leonard*, 705 F.2d 1304; *Berdin* v. *Duggan*, 701 F.2d 909, 911-12 (11th Cir. 1983).

In the present case, the Court of Appeals for the Fourth Circuit followed the procedure outlined above, which resulted in its holding for Officer Berger. At each step, the Respondent was found to have met his burden, while the Petitioner was unable to demonstrate its right to discipline him.

A. The Question Whether Or Not Respondent's Performance Was "Speech Upon A Matter Of Public Concern" Was Not Raised In The Court Of Appeals.

While the Petitioner did express some concern with the District Court's characterizing Officer Berger's expres-

sions as "a matter of public concern," (Appellee's Brief for Court of Appeals, at 7-9), the Police Department did not dispute that Officer Berger's performance amounted to "speech" and was entitled to some constitutional protection. The Court of Appeals, in fact, remarked on the absence of disagreement on this point:

> . . . the district court held that the speech, as a form of artistic expression presented to obviously interested public audiences, was, for the purpose at hand, "on a matter of public concern." *The defendants do not on appeal challenge that basic determination*, and we agree with it.

Berger v. *Battaglia*, 779 F.2d at 998, emphasis added; Petitoner, 12a-13a.

Despite this Court's power to conduct an independent review of the record in constitutional cases, questions not raised or considered below are usually not examined on review by *certiorari* unless thate is plain error. *New York Dock Co.* v. *S.S. Poznan*, 274 U.S. 117, 123 (1927). In this case, Petitioner, by raising issues which it did not challenge in the courts below, seeks to inject a new theory at a very late stage.

Both the District Court and the Court of Appeals correctly resolved all questions concerning the nature of Officer Berger's expression. Before holding that Officer Berger's speech was within the *Pickering* spectrum, and "of a matter of public concern," the Court of Appeals necessarily found that the performance was in fact "speech." 779 F.2d at 996, 998-999; Petitioner, pp. 8a-9a, 12a-15a.[1]

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[1] Although the Petitioners, Petition, pp. 10-13, argue that Berger's wearing blackface could be characterized as "symbolic" expression, perhaps meriting lesser first amendment protection, the district

B. The Respondent's "Speech" Was On A Matter Of Public Concern.

This Court in *Connick* v. *Meyers*, defined "matters of public concern" as expression "fairly considered as relating to any matter of political, social, or other concern to the community." 461 U.S. at 146. Further, "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-148.

Applying the *Connick* test, the Court of Appeals agreed with the district court "that the speech, as a form of artistic expression, presented to obviously interested public audiences, was, *for the purpose at hand*, 'on a matter of public concern.'" 779 F.2d at 998; Petition, 12a, emphasis added. Thus, the fact that the content was entertainment did not make the performances any less a "matter of public concern," nor take them outside first amendment protection. *E.g.*, *Stanley* v. *Georgia*, 394

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court recognized that the blackface makeup is an unseverable part of the total performance, which strives for maximum verisimilitude and without which the attempted reincarnation of Al Jolson would lose its point. The district court stated, "[A]ccurate portrayal of an historical figure is of significantly more interest to the public than the speech involved in *Connick*, *supra*." *Berger* v. *Battaglia*, Mem. Opinion No. B-82-880 (D. Md. March 21, 1984), Petition, p. 38a. As to the nature of the expression itself, this Court has declared, "[T]he line between the transmission of ideas and mere entertainment is much too elusive for this court to draw, if indeed such a line can be drawn at all." *Stanley* v. *Georgia*, 394 U.S. 557 (1969). This Court has also recognized that "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence* v. *Washington*, 418 U.S. 405, 411 (1974). In the context in which Berger wore blackface for his Al Jolson performances, the makeup was given meaning by character he portrayed.

U.S. 557, 566 (1966). The additional fact that the content of Berger's performances did not concern the af fairs of his employer, if of any avail, would place him outside the *Pickering* scheme and into the shoes of an ordinary citizen. *See Connick*, 461 U.S. at 157, Brennan, J., *Dissenting Opinion.*

C. An Off-Duty, Out Of Uniform Police Officer Whose Speech Did Not Concern His Employer, Has The Same Right Of Free Speech As Any Member Of The General Public.

Recognizing the governmental interest in promoting the efficiency of the public service, *Pickering* accords the government as employer rights to regulate speech that it lacks as sovereign. 391 U.S. at 568, *Wilson* v. *City of Littleton, Colo.*, 732 F.2d 765, 767 (10th Cir. 1984). It follows, however, that when the employee, speaks on a subject that is not work related, the government employer loses the enhanced rights of the employment context because the efficiency of its public service is not compromised.

> The balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the government's interests as an employer. When public employees engage in expression unrelated to their employment while away from the work place, their First Amendment rights are, of course, no different from those of the general public. See [391 U.S.] at 574, 88 S.Ct. at 1737. Thus, whether a public employee's speech addresses a matter of public concern is relevant to the constitutional inquiry only when the statements at issue—by virtue of their content or the context in which they were made—may have an adverse impact on the government's ability to perform its duties efficiently.

Connick v. *Myers*, 461 U.S. at 157, Brennan, J., *dissenting opinion.*

Connick recognized that the time, place and manner of the speech in question is relevant in the *Pickering* analysis. 461 U.S. at 152. In *Connick*, this Court paid special attention to not only the fact that the employee's critical questionnaire was prepared and distributed at her office, but also that "the manner of distribution required not only Myers to leave her work but others to do the same in order that the questionnaire be completed." *Id.* at 153. It was this fact that distinguished *Connick* from *Pickering*, as the evidence substantiated the supervisor's fear that the efficient functioning of the office was jeopardized. *Id.*

In a case involving a police officer, the Court of Appeals for the Eleventh Circuit held that the officer could not be disciplined by his superiors for remarks made to a friend in a bar when the officer was off-duty and out of uniform. *Waters* v. *Chaffin*, 684 F.2d 833 (11th Cir. 1983). The court noted, "[I]n addition to Waters' fundamental interest in speaking as he chooses, he has an interest in being free from unnecessary work-related restrictions while off-duty." *Id.* at 837.

Officer Berger's performances, as the Court of Appeals recognized, merit the same constitutional protection as the speech of any other citizen, since his performances were not at the Police Department, and the content did not concern the Department. Subject only to a few exceptions not relevant here, speech is protected regardless of the social, political or ideological value of its content. The guarantee of the First Amendment extends to the trivial as well as the ponderous, the vulgar as well as the lyrical. *Stanley* v. *Georgia*, 394 U.S. 554, 89 S.Ct. 1243; *Winters* v. *New York*, 333 U.S. 507, 68 S.Ct. 665 (1948). The First Amendment extends to trash if it stops short of obscenity, *Huffman* v. *United States*, 470 F.2d 386 (D.C. Cir. 1971), and, if no immediate breach of the peace is threatened,

protects the vulgar and the profane as well as "wholly neutral futilities," *Edwards* v. *Habib*, 397 F.2d 687 (D.C. Cir. 1968), *cert. den.*, 393 U.S. 1016, *See also Connick* v. *Myers*, 461 U.S. at 138, n. 1, Brennan, J., *dissenting opinion*. Thus Officer Berger's performances are no less shielded from regulation by his employer for being light-minded.

The protection of the First Amendment, extends to those who wish to attend and hear Berger's performances as well. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). Those who might take offense at the content of Berger's speech are not empowered to suppress speech because of its perceived message, nor may the government regulate speech, even of its employees, to protect their sensibilities. *E.g.*, *Terminiello* v. *City of Chicago*, 337 U.S. 1 (1949). One of the "high purposes" of the First Amendment is to provide a hospitable climate for expression that "invite[s] dispute . . . induces a condition of unrest, created dissatisfaction with conditions as they are, oreven stirs people to anger." *Id.* at 4. *See also, e.g.*, *Coates* v. *City of Cincinnati*, 401 U.S. 611, 615 (1971); *Bachellar* v. *Maryland*, 397 U.S. 564 (1970); *Street* v. *New York*, 394 U.S. 576, 592 (1969); *Edwards* v. *South Carolina*, 372 U.S. 229, 237 (1963); *Collin* v. *Smith*, 578 F.2d 1197 (7th Cir. 1978).

Thus, although Berger was a public employee, his performances were such that the *Pickering* analysis is not necessary inasmuch as the speech occurred off duty and did not concern his employer.

II. THE LOWER COURTS HAVE BEEN CONSISTENT IN THEIR APPLICATION OF THE *PICKERING* TEST TO CASES WHICH REQUIRE BALANCING THE INTERESTS OF THE PUBLIC EMPLOYEE, AS A CITIZEN, IN COMMENTING ON MATTERS OF PUBLIC CONCERN AND THE INTEREST OF THE STATE, AS AN EMPLOYER, IN PROMOTING THE EFFICIENCY OF THE PUBLIC SERVICES IT PERFORMS THROUGH ITS EMPLOYEES.

The lower courts' use of the *Pickering* analysis exhibits not a state of confusion, as Petitioners assert, but attention to this Court's admonition in *Connick*, that "whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record." 461 U.S. at 147-48. This statement compels a careful, case-by-case application of the *Pickering* test. In striking a proper balance, courts must weigh the factual record in each case, rather than attempting to fit a myriad of disparate situation into a systematic mold. This is also true for *Pickering*'s subsequent balancing of the government's interest and that of its employees. Thus, those cases that Petitioner contends demonstrate confusion and inconsistent application of the *Pickering* analysis, actually , on close scrutiny, display a careful application to distinguishable facts.

The Court of Appeals for the Eleventh Circuit recently upheld a sheriff's department's dismissal of a clerk who had identified himself on television as both a Ku Klux Klan recruiter and a sheriff's office employee. *McMullen* v. *Carson*, 754 F.2d 936 (11th Cir. 1985). In applying the *Pickering* analysis, the court paid particular attention to the employee's participation and "to the nature, both actual and perceived, of the Klan as a *violent*, *criminal*, and *racist* organization." *Id.* at 938 (emphasis added). The

court found under the balancing test that the sheriff's office need not permit a known Klan member who embraced the organization's unlawful purpose to stay on in any position contrary to its charge of "securing the safety of persons and property, and enforcing the law." *Id.* at 939. By the same token, a police department is not required to hire a known homosexual who has admitted to habitual conduct in violation of the state's statute prohibiting deviate sexual acts. *Childers* v. *Dallas Police Department*, 513 F.Supp. 134 (N.D. Texas 1981). While the results of the *Pickering* analysis in these cases were opposite that of the present case, the test was properly applied to situations in which the actual conduct of the employee was illegal or directly contrary to the responsibilities of the employer, rather than based on perceptions of that conduct by others.

Even when the speech of the employee does not conflict with the responsibilities of the public employer, it may still be regulated if it is not a matter of public concern. *See Connick* v. *Myers*, 461 U.S. 138. The Court of Appeals for the Tenth Circuit held that a police officer was properly dismissed for disobeying an order to remove a black shroud from his badge while on duty. *Wilson* v. *City of Littleton, Colo.*, 732 f.2d 765 (10th Cir. 1984). The court ruled that although the shroud was worn to mourn the death of a fellow officer, "the content, form and context of the given statement as revealed by the whole record" showed that the speech was *not* "upon a matter of public concern." *Id.* at 768-69. Had that speech found to be of public concern, as in *Leonard* v. *City of Columbus*, 705 F.2d 1299 (11th Cir. 1983), the *Pickering* balance would have swung for the employee.

The Court of Appeals for the Fourth Circuit has likewise reached differing results while correctly applying

the *Pickering* test to particular cases. As Petitioner has pointed out, Petition, p. 22-23, that court has recognized that because of its additional interest as an employer, the government "*may* have interests in regulating the speech of its employees that differ from its interests in regulation of the citizenry at large." *Hickory Fire Fighters Ass'n* v. *Cit of Hickory, N.C.*, 656 F.2d 917 (4th Cir. 1981); *Henrico Professional Firefighters Ass'n, Local 1568* v. *Board of Supervisors*, 649 F.2d 237, 243 (4th Cir. 1981). Petitioner would have this Court ignore the discretionary element of the word "may." The *Pickering* balance, as Petitioner conceives it, must always be struck in favor of the employer. However, in *Hickory*, as in *Berger*, the court followed its role as defined by this Court and upheld the employee's right to speak on matters of public concern.

In the present case, the Court of Appeals for the Fourth Circuit correctly applied the *Pickering* analysis when it held that the Baltimore Police Department could not condition the continued employment of one of its police officers on his cessation of off-duty public entertainment in blackface, the content of which regarded a matter of public concern but did not discuss the internal operations or relationships of the Department. Taking into account the fact that Berger did not identify himself as a police officer, the court also correctly held that the Department's fear of external disruptions resulting from his performances did not overcome the officer's right of free speech.

In summary, although the results of individual cases may vary, these contrary results are reflective of the particular facts of each case. The *Pickering* test has been correctly and uniformly applied as law throughout the lower courts.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that a Writ of Certiorari should not issue in this case.

Respectfully submitted,

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